

MISC. CRIMINAL APPLICATION NO. 2247 OF 1995.

Date of decision: 22.3.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. R.N. Shah, advocate for petitioner.

Mr. S.R. Divetia, A.P.P. for respondent No.1-State.

Mr. J.B. Pardiwala, advocate for respondent No.2.

1. Whether Reporters of Local Papers may be allowed to see the judgment?-yes
2. To be referred to the Reporter or not?-yes
3. Whether their Lordships wish to see the fair copy of judgment? -No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? -No
5. Whether it is to be circulated to the Civil Judge? -No

Coram: R. R. Jain, J.

March 22, 1996.

Oral judgment:

This is a petition by original complainant under Section 439 (2) of Criminal Procedure Code for cancellation of bail granted to respondent No.2 by the learned Chief Judicial Magistrate, Valsad at Navsari vide order dated 29.5.1995. An offence alleged to have been committed on 20.2.1995 at 10.30 P.M. came to be registered vide C.R.No.18/95 on 21.2.1995 under Sections 302, 323, 324, 504 read with Section 34 of the IPC and Section 135 of the Bombay Police Act against respondent No.2. The

respondent No.2 was arrested on 23.2.1995 and the charge-sheet was filed on 24.5.1995. Despite the fact that the charge-sheet came to be filed on 24.5.1995 the respondent No.2 moved an application under Section 167 of Cr.P.C. on 24.5.1995 for releasing on bail pleading that the prosecution has not submitted police report within the statutory period of 90 days prescribed under law. The order passed on 29.5.1995 by the learned Magistrate is placed on record. I have carefully gone through the order to find that only ground which weighed the learned Magistrate for granting bail is delay in submitting police report within statutory period. In other words, the learned Magistrate has exercised his discretion purely on technical ground of not filing the police report within the stipulated period and enlarged the respondent No.2 on bail. It would be pertinent to note that learned Judge did not consider on merits and has rightly done so as consideration on merits would be beyond his competence as being Sessions Triable case.

In my view, exercise of discretion is patently erroneous in the light of judgment of the Supreme Court in the case of Sanjay Dutt v. State through CBI, (1994) 5, SCC 410, wherein the scope of Section 167 of Cr.P.C. and the powers of Court to exercise discretion has been discussed at length and in detail. In this decision, the Supreme Court has observed as under:

".....The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply....."

Similar view has also been taken by the Supreme Court in a recent decision in the case of State through CBI v. Mohd. Ashrift Bhat, (1996) 1 ,SCC 432. At this stage,

Mr. Pardiwala, learned advocate for respondent No.2, argued that the right accruing to respondent under Section 167 was exercised on the 91st day and, therefore, the Court without adjourning the matter should have passed appropriate orders releasing the respondent on bail. Instead of that the Court adjourned the hearing and passed order on 29.5.1995. As argued by Mr. Pardiwala, it is not the passing of the order by the court but the exercise of right by the accused is relevant and if right is exercised, at the time when it accrued, cannot be taken away by subsequent event, i.e., order passed after its accrual. This argument of Mr. Pardiwala finds answer from paragraph 4 of the judgment of the Supreme Court in the case of State of M.P. v. Rustam, 1995 SCC (Cri) 830. The relevant observation of the Supreme Court reads as under:

".....We may also observe that the High Court's view in entertaining the bail petition after the challan was filed was erroneous. The matter now stands settled in Sanjay Dutt v. State in which case Hitendra Vishnu Thakur v. State of Maharashtra has aptly been explained away. The court is required to examine the availability of the right of compulsive bail on the date it is considering the question of bail and not barely on the date of the presentation of the petition for bail. This well-settled principle has been noticed in Sanjay Dutt case on the strength of three Constitution Bench cases--Naranjan Singh Nathawan v. State of Punjab, Ram Narayan Singh v. State of Delhi and A.K. Gopalan v. Govt. of India. On the dates when the High Court entertained the petition for bail and granted it to the accused-respondents, undeniably the challan stood filed in court, and then the right as such was not available."

In view of this observation, it becomes crystal clear that the day on which the accused exercised right as accruing under Section 167 is not relevant and material but the day on which the court passed order is relevant and if the police report was before the court the day on which order was passed, the right alleged to have accrued under Section 167 shall stand extinguished. In this view of settled legal position, the impugned order is patently erroneous, illegal, unjust and warrants interference by this Court.

Accordingly, the application is allowed. The impugned order passed by the learned Chief Judicial Magistrate,

Navsari dated 29.5.1995 is hereby set aside. The order of the learned Chief Judicial Magistrate granting bail to respondent No.2 is hereby revoked. Respondent No.2 is directed to surrender before the trial court on 30.3.1996 failing which the trial court shall be at liberty to take appropriate steps in accordance with law.

Rule made absolute accordingly.